

75-1080

Supreme Court, U. S.

FILED

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IN THE SUPREME COURT OF THE UNITED STATES
MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1975

No. A-604

PETER FRANKLIN,

Petitioner,

- against -

EDGAR A. LEVY COMPANY, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

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Respondent, John J. Sweeney, President, Local 32B, Service Employees International Union, AFL-CIO, and successor to the late Thomas Shortman, prays that petitioner's request for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on October 7, 1975 be denied.

STATUTORY PROVISIONS AND RULES

Respondent believes that the following statutes and rules are applicable rather than those suggested by petitioner. Federal Rules of Appellate Procedure, Rules 26(b) and 31(a); Rules Relating to the Organization of the Court of Appeals for the Second Circuit, § 0.18. The text of these Rules is set forth in the Appendix, Pages 1 to 3.

QUESTION PRESENTED

Respondent believes that the following question is presented rather than those suggested by petitioner:

Did the Court of Appeals correctly adjudge that an appeal by the petitioner filed on July 2, 1969, from a judgment of the United States District Court for the Southern District of New York, entered on June 23, 1969, should be dismissed?

STATEMENT OF CASE

In November, 1968, petitioner commenced an action in the United States District Court for the Southern District of New York against respondent, Thomas Shortman, as President of Local 32B, a labor organization; and Edgar A. Levy Company, a corporation doing business in the City of New York. Petitioner alleged that Edgar A. Levy Company terminated the employment of petitioner on August 21, 1968, without just cause, and that said termination was effected at the request of Local 32B. Respondent Shortman and respondent Edgar A. Levy Company moved to dismiss the complaint and the motions were granted by Judge Herlands in a judgment entered June 23, 1969; notice of appeal to the Circuit Court of Appeals for the Second Circuit from said judgment of June 23, 1969, was filed on July 2, 1969. The record was filed and the appeal was docketed in the

Court of Appeals for the Second Circuit on August 8, 1969.

On June 12, 1972, the Court of Appeals for the Second Circuit dismissed the appeal of petitioner pursuant to Rule 50.18 (7) of the rules of the Court of Appeals for the Second Circuit. The text of the said rule is set forth in the Appendix annexed hereto. That Court, in its order dismissing petitioner's appeal, indicated that no brief had been filed nor had any stipulation extending the time for such filing been filed within nine months of the docketing of petitioner's appeal.

In August, 1975, petitioner, pro se, in an undated and unsworn statement moved the Court of Appeals for the Second Circuit to restore the appeal which had been dismissed two years and ten months previously. On October 7, 1975, the Court of Appeals for the Second Circuit filed an order denying said motion.

REASONS FOR DENIAL OF THE WRIT

POINT I

THE COURT OF APPEALS CORRECTLY DISMISSED THE APPEAL ON ITS OWN MOTION

The notice of appeal to the Circuit Court of Appeals was filed on July 2, 1969, and the appeal was docketed on August 8, 1969. No brief was filed in the Court of Appeals, and, accordingly, that Court dismissed the appeal two years and ten months after it had been docketed.

Petitioner in his petition for a writ of certiorari dated October 15, 1975, complains at great length about certain attorneys who represented him at various stages of his action. He states on page 4 of his petition that none of these various attorneys "perfected the appeal" and, accordingly, his appeal was dismissed by the Court of Appeals almost three years after it had been docketed. This argument which seeks to imply that peti-

tioner was the victim of certain attorneys' neglect cannot withstand examination as to the length of delay between the Order of Dismissal by the Circuit Court of Appeals and petitioner's attempt to restore the appeal to that Court's calendar. More than three years elapsed between that order and petitioner's appeal for restoration to the Circuit Court of Appeals.

Federal Rules of Appellate Procedure, Rule 26(b) permits an appellant, on good cause shown, to seek an extension of time in which to do an act required by the said Rules. Rule 31(a) clearly requires that the appellant file his brief within forty days after the date on which the record is filed with the Court of Appeals. Rule § 0.18(7) of the Rules Relating to the Organization of the Court of Appeals for the

Second Circuit states that the Clerk of the Circuit Court of Appeals, unless otherwise directed, shall enter an order dismissing the appeal in a case where a brief for the appellant has not been filed within nine months of docketing of the appeal and no stipulation extending the time for filing has been filed. Such an order was entered on June 12, 1972. More than three years later, petitioner, pro se, requested the Circuit Court to "restore" the matter to its calendar.

CONCLUSION

Respondent respectfully requests that petitioner's petition for a writ of certiorari to the United States Court of Appeals for the Second

Circuit be denied.

Respectfully submitted,

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A P P E N D I X

FEDERAL
RULES OF APPELLATE PROCEDURE
for the
United States Court of Appeals

Rule 26. COMPUTATION AND EXTENSION
OF TIME.

(b) ENLARGEMENT OF TIME. The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal. Nor may the court enlarge the time prescribed by law for filing a petition to enjoin, set aside, suspend, modify, enforce or otherwise review, or a notice of appeal from, an order of an administrative agency, board, commission or officer of

the United States, except as specifically authorized by law.

Rule 31. FILING AND SERVICE OF BRIEFS.

(a) TIME FOR SERVING AND FILING BRIEFS. The appellant shall serve and file his brief within 40 days after the date on which the record is filed. The appellee shall serve and file his brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the appellee, but, except for good cause shown, a reply brief must be filed at least 3 days before argument. If a court of appeals is prepared to consider cases on the merits promptly after briefs are filed, and its practice is to do so, it may shorten the periods prescribed above for serving and filing briefs, either by rule for all cases or for

classes of cases, or by order for specific cases.

UNITED STATES
COURT OF APPEALS
For The
SECOND CIRCUIT

PART I-RULES RELATING TO THE ORGANIZATION OF THE COURT

§ 0.18. ENTRY OF ORDERS BY THE CLERK

The clerk shall prepare, sign and enter the following without submission to the court or a judge unless otherwise directed:

(7) Orders dismissing appeals in all cases where a brief for the appellant has not been filed within nine months of the docketing of the appeal and no stipulation extending the time for such filing has been filed.